IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 33.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

RAYMOND I. BASHFORD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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INDEX.

	Page
Statement	1
Argument	
Atlas, unlike Glidden, was "a party", within the literal terms of Section 112 (i) (2), to a reorganization as defined in Section 112 (i) (1) (A) of the Revenue Act of 1928	3
Atlas was "a party to the reorganization" within the natural meaning of the terms irrespective of the applications of Section 112 (i) (2) of the Revenue Act of 1928	17
On the facts in this case there was sufficient continuity of interest qua the Atlas stock within the meaning of the statute	18

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Since Respondent's original brief was filed on October 13, 1937, this Court has rendered an Opinion in the case of *Herman C. Groman* v. *Commissioner of Internal Revenue*, No. 21, hereinafter referred to as the *Groman case*, and on the same day, November 8, 1937, ordered that the instant case be restored to the docket for reargument on December 13, 1937.

This supplemental brief will be confined to pointing out the clear distinction in facts between the instant case and the *Groman case* and to restating Respondent's argument

in its original brief on those points on which the Opinion in the *Groman case* has shed additional light.

As we understand the Opinion in the *Groman case,* Glidden was held not to be a party to a reorganization:

> *First*—Because Glidden did not come within the terms of Section 112 (i)(2) in that "it was not a corporation resulting from the reorganization, and it did not acquire a majority of the shares of voting stock and a majority of the shares of all other classes of stock *of any other corporation in the reorganization.*" (Emphasis added.)
>
> *Second*—That while Section 112 (i)(2) is not a definition of the term "a party to a reorganization" and does not exclude all corporations not specifically described therein, yet Glidden was not "a party" because it was not a corporation whose relation to the exchange between Indiana and Ohio would in common usage be so denominated, since Glidden received nothing from the shareholders of Indiana and transferred nothing to them, the exchange being solely between the stockholders of Indiana and Ohio.
>
> *Third*—That the fact that Glidden stock did not represent to the taxpayer a definite and substantial continuity of interest in the stock of Indiana transferred by him to the new company confirms the conclusion reached in the preceding paragraph, that Glidden was not a party to the reorganization effected by the exchange between the stockholders of Indiana and the new company.

In summarizing its conclusions, the Court held that Glidden was not "a party to the reorganization" within either the letter or the spirit of the Revenue Act.

Considering the instant case in the light of these conclusions reached by the Court in the *Groman case,* Respondent's argument will follow, as far as possible, the order in which these conclusions are stated above.

Atlas, unlike Glidden, was "a party", within the literal terms of section 112 (i) (2), to a reorganization as defined in section 112 (i) (1) (A) of the Revenue Act of 1928.

Atlas acquired not only a majority of the voting stock and a majority of the stock of all other classes of another corporation (the new company) *in the reorganization* but *of all* of the other corporations (Peerless and Union) *in the reorganization.* These transactions, considered separately or as a whole, constitute statutory reorganizations under Section 112 (i)(1)(A). Atlas was therefore so evidently a party (as that term is used in Section 112 (b)(3) of the Act) "* * * to the reorganization that we do not need section 112 (i)(2) to inform us of the fact," *and furthermore, it comes squarely within the literal terms of that section.*

In this respect the instant case is clearly distinguishable from the *Groman case* in which this Court found that Glidden did not acquire a majority of the shares of the voting stock and a majority of the shares of all other classes of stock of *any other* corporation in the reorganization.

The difference in the facts cannot be measured alone, however, in terms of the larger interest which Atlas acquired in the new company, significant as that may be in considering the literal terms of the statute. To determine the deeper significance of this difference it is necessary to consider the means by which Atlas emerged with the majority of the stock of all classes of that company at the conclusion of the transaction and the purpose sought to be accomplished by the transaction considered as a whole.

Atlas actually acquired, as a part of the plan, on October 7, 1930, substantially all of the shares of Peerless and Union in direct exchanges with the taxpayer and the other stockholders of those companies in part consideration for which it delivered to the shareholders 6318 shares of Atlas preferred stock and 8712½ shares of its common stock. (R. 133-136.) *It was in this exchange that Respondent received*

Atlas stock, the gain on the acquisition of which is the subject matter of the present controversy. (R. 133.)

1. The essential differences in the facts of the two cases are clearly demonstrable from the following summaries:

Groman Case.	*Instant Case.*
1. The plan of reorganization of Indiana and Ohio was provided for in an agreement between Glidden and the shareholders of Indiana.	1. The plan for consolidating Peerless and Union with Atlas was provided for in agreements between agents of Atlas, and the shareholders of Peerless and Union. (R. 133-134.)
2. Glidden, as a preliminary step organized Ohio with a capital structure divided into preferred and common shares; and subscribed to all of its common stock for which it paid cash and shares of Glidden prior preference stock.	2-a. Atlas organized the new company on September 22, 1930, with a nominal issue of ten shares of preferred and ten shares of common stock which it subscribed to for cash. (R. 131.) On October 6, 1930, Atlas increased the authorized capital of the new company to an amount sufficient to provide for the exchanges to be made under the plan. (R. 131.)
	b. Atlas, through its agents, entered into a contract with the new company which in substance provided that it would deliver to the new company the stock and/or assets[1] of Peerless and Union, $960,-

[1] In the agreements between Atlas and the stockholders of Peerless and Union, Atlas was given the option, upon acquiring the stock of those companies " * * * to effect the liquidation of the three former companies or the transfer of their assets subject to their liabilities, * * *" to the new company. (R. 53, 73.) This option would have enabled Atlas to have proceeded in any one of three ways: (1) To acquire their assets in liquidation and thereafter

Groman Case.	*Instant Case.*
	560.25[2] cash, 6318 shares of Atlas preferred, and 8712½ shares of Atlas common stock in consideration *for all*[3] *of the stock, both common and preferred of the new company* and the *redelivery*[4] to Atlas of $632,150 cash, and the above mentioned shares of Atlas common and preferred stock.
3. The stockholders of Indiana agreed to transfer	3. Atlas' agents agreed to deliver to the stockholders of

transfer them to the new company, or (2) to retain the stock of the old companies, cause their assets to be transferred to the new company and thereafter continue their separate corporate existence as holding companies of stock of the new company to which Atlas was entitled under the plan, or (3) to transfer the stock of the old companies to the new company and thereafter cause the new company to take such corporate action as was necessary to effect a dissolution of the old companies and a transfer of their assets to the new company. In exercise of its option Atlas adopted alternative (3) above.

[2] The contract between Atlas' agents and the new company in part provided that Atlas in acquiring the stock of the new company would deliver to it " * * * such amount of cash and securities of Atlas as may be necessary for New Company to acquire the securities and/or assets of Peerless and Union from Promoters, as herein provided, and to retain a cash working capital of $300,000." As a few minority stockholders failed to participate, the new company *redelivered to Atlas' agents* only $632,150, leaving the new company the balance of $328,410.25. (R. 84-85.)

[3] Atlas on receipt of the stock of the new company was obligated to deliver 27,054.54 of the common shares to the stockholders of Peerless and Union. (R. 137.)

[4] The Atlas stock and cash was to be delivered to the new company in fulfillment of Atlas' obligations in the agreements with the stockholders of Peerless and Union to underwrite the preferred stock and 32,198 shares of the common stock of the new company, as a payment against the legal issuance by the new company of that amount of stock. (R. 85, 132.) The *redelivery* to Atlas of said cash and Atlas securities together with the *delivery* of the stock of the new company put Atlas in a position to complete its exchanges with the stockholders of Peerless and Union. (R. 84, 135.)

Gróman Case.	*Instant Case.*
their shares to Ohio in exchange for a stated number of prior preference shares of Glidden and of preferred shares of Ohio at an agreed valuation and sufficient cash to equal the appraised value of Indiana's assets.	Peerless and Union approximately $632,150 in cash, 6318 shares of Atlas preferred stock, 8712½ shares of Atlas common stock and 27,054.54[5] shares of the common stock of the new company in exchange for substantially all of the shares of Peerless and Union. (R. 133-134, 136-137.)
4. The shareholders of Indiana received from *Ohio* all of its preferred stock and certain shares of prior preference stock of Glidden in exchange for which they transferred to Ohio all of the stock of Indiana.	4-a. In a series of exchanges consummated on October 7, 1930, the stockholders of Peerless and Union delivered to Atlas substantially all of the stock of those companies.[6] (R. 136, 193)
	4-b. Atlas delivered to the new company 8712½ shares of its common stock, 6318 shares of its preferred stock[7] and approximately $960,000.00 in cash and *substantially all of the shares of Peerless and Union.* (R. 22, 29, 84-85, 132, 135-136.)

[5] These are the amounts actually exchanged as found by the Board. (R. 136.) The agreements with the stockholders merely provided the rate of exchange, not specifying the total number of shares to be delivered. (R. 55, 74.)

[6] All but a few scattered minority stockholders of Peerless and Union participated in the exchanges and their stock was acquired by the new company shortly after the reorganization was consummated on October 7, 1930. (R. 135, 177.)

[7] These certificates of Atlas common and preferred stock were made out in the names of the stockholders of Peerless and Union (R. 22) to whom they were ultimately to be delivered by Atlas. (R. 29-31.)

Groman Case.	*Instant Case.*
	4-c. The new company redelivered to Atlas, in exchange therefor, the certificates of Atlas common and preferred stock, referred to in the preceding paragraph, $632,150.00 cash *and all of the preferred and common stock of the new company.*[8] (R. 23, 132, 135-136.)
	4-d. Atlas delivered to the stockholders of Peerless and Union 8712½ shares of Atlas common stock, 6318 shares of Atlas preferred stock and approximately $632,150 in cash and 27,054.54 shares of the new company common stock. (R. 132-137.)
5. The new company acquired the assets of Indiana in liquidation of its stock and Indiana was dissolved.	5. The new company acquired the assets of Peerless and Union in liquidation of their stock and caused the old companies to be dissolved. (R. 136.)
6. Ohio continued to operate the business formerly conducted by Indiana. Glidden became the sole owner of the new company's common stock and the former	6. The new company continued to operate the businesses formerly conducted by Peerless (including its wholly owned subsidiary, Black Diamond) and

[8] All of the preferred stock of the new company, *i. e.* 21,732 shares, and 32,198 shares of the common were issued to Atlas direct (R. 132); 5,000 shares of the common stock of the new company were issued to Fletcher and Seligman as nominees of Atlas (R. 137-138), and 27,054.54 shares of the common stock of the new company, being the balance issued under the plan, were delivered to the stockholders (or their representatives) of Peerless and Union on October 7, 1930, pursuant to the agreements. (R. 136-137.)

Groman Case.	*Instant Case.*
shareholders of Indiana became the sole owners of its preferred stock.	Union. Atlas became the owner of all the new company's preferred stock and 57% of its common stock.[3]

2. The Board of Tax Appeals found that Fletcher and Seligman, designated "Promoters" in the agreements, were agents of Atlas and that they disclosed this fact to the majority stockholders of Peerless and Union as soon as the latter indicated they would be interested in participating in a plan of reorganization substantially as consummated on October 7, 1930 (R. 130). This was in July 1930 (R. 195). There is no evidence in the case to the contrary and Petitioner acquiesced in the Board's findings by abandoning assignments of error in the court below. Obviously Fletcher and Seligman were contracting parties, in behalf of Atlas, with both the new company and the stockholders of Peerless and Union and hence were not agents either of the new company or said stockholders. Nor has Petitioner ever raised any question as to that conclusion prior to his Supplemental Brief in this Court.

Petitioner, in his Supplemental Brief, erroneously states that the agents of Atlas did not acquire the stock of Peerless and Union for Atlas but merely acted as a conduit for passing that stock to the new company. There is no support for this contention in the evidence or in the findings of the Board. On the contrary they acquired the stock for Atlas and this is one of the fundamental distinctions between the plan of reorganization here and the plan in the *Groman case*. Here it was a part of the plan from its inception that

[3] The plan contemplated that the new company would issue not in excess of 21,732 shares of preferred and 65,000 shares of common stock in consummation of the plan. After fulfilling its commitments to the stockholders of Peerless and Union to deliver 27,054.54 shares of the common stock of the new company, Atlas was entitled to retain, and did retain, the ownership of the balance, or all the preferred and 57 per cent or 37,198 shares of the common stock. (R. 136-138, 179.)

Atlas and *not* the new company would participate in all the exchanges, whereby the stocks and/or assets of Peerless and Union would be consolidated with Atlas. Atlas, unlike Glidden, was a party to all of the exchanges while the new company was a party only to exchanges with Atlas. In order that Atlas, rather than the new company, could consummate the exchanges, it was necessary for Atlas to acquire the stock of Peerless and Union and likewise acquire all of the stock of the new company. Upon acquiring the stock of all three companies, Atlas was in a position to complete its exchanges with the stockholders of Peerless and Union, cause the old companies to liquidate and transfer their assets to the new company, and at the same time retain the ownership of a majority of the common and preferred stock of the new company.

On October 7th, when the plan of reorganization was consummated, the stockholders of Peerless and Union, in order to perform *their part* of the agreements, were obligated *only* to deliver to Atlas their certificates of stock in the old companies. This they did. Atlas *on its part* was obligated not only to exchange for those shares a certain consideration, in the form of shares of Atlas, cash and shares in the new company, *but also* to undertake the formation of the new company and to furnish if with additional working capital.

The stockholders of Peerless and Union did not participate in the contract or exchanges between Atlas and the new company. Atlas organized the new company as a receptacle for the business and assets of Peerless and Union. Through this contract with the new company, *Atlas, not the new company* (as in the *Groman case*), put itself in a position to complete the exchanges direct with the stockholders of Peerless and Union. Petitioner has asked this Court to find that Atlas did not acquire the stock of Peerless and Union within the statutory meaning because, he contends, Atlas was bound to immediately transfer that stock to the new company. In reaching that erroneous conclusion Petitioner overlooks two important considerations:

First. Under its agreements with the stockholders of Peerless and Union, Atlas was not obligated to convey the stock of the old companies to the new company, but, as previously stated herein,[10] Atlas could have continued to retain those shares or could have made any other disposition of them it chose so long as it effected the transfer of their assets to the new company. Thus Atlas could have continued the corporate existence of Peerless and Union as holding companies of stock of the new company to which Atlas was entitled, or it could have liquidated those companies, acquired their assets and itself transferred their assets direct to the new company.

Second. Petitioner has erroneously assumed that by reason of Atlas' delivery of the shares of Peerless and Union to the new company, it thus divested itself of the beneficial interest in those shares or its proprietary interest in the business and assets of Peerless and Union, represented by their outstanding shares. On the contrary, upon the delivery of those shares to the new company, the latter was *bound* to deliver to Atlas *all of its stock* to be issued under the plan. Atlas on the other hand was entitled to retain the ownership of all of said stock, subject to its commitment to the stockholders of Peerless and Union, as the net result of which, Atlas became the owner of all the preferred and 57 per cent of the common stock of the new company. Thus in fulfilling its commitment to the stockholders of Peerless and Union, Atlas was divested, in terms of its proprietary interest in the business and assets of Peerless and Union, of only *the difference* between *substantially all* of the shares of both individual companies and a *majority* of the shares of all classes of the combined company. The new company's sole assets at the completion of the plan, except for approximately $300,000 working capital supplied by Atlas, were the assets previously owned by Peerless, Black Diamond and Union. Thus, Atlas merely divested itself of one

[10] See Footnote p. 4.

form of stock interest for another form of stock interest no less direct in its proprietary interest in the assets of Peerless and Union.[11]

The change in Atlas' interest was one purely of form. No new corporate entity was interposed to insulate the directness of that interest. Thus Atlas acquired *direct from the shareholders of Peerless and Union, as its interest in those companies, the majority of the stock of all classes, not only of the stock which the taxpayer and the other stockholders of Peerless and Union formerly owned in those companies, but as a direct result thereof the stock of the company to which all of the assets of the three prior existing corporations were transferred.* This resulting acquisition did not deprive Atlas of the fruits of its exchange with the stockholders of the old companies.

It is for this reason that *Bassick* v. *Commissioner*, 85 Fed. (2) 8 (C. C. A. 2), certiorari denied 299 U. S. 592, and *Starr* v. *Commissioner*, 82 Fed. (2) 964 (C. C. A. 4), certiorari denied 298 U. S. 680, cited by Petitioner in his Supplemental Brief (p. 8), do not require a contrary conclusion. The issue in the *Bassick case* was whether Bassick had acquired statutory control (80 per cent) of the stock of the new company upon his acquisition of the first stock issued by the new company. Under the plan of reorganization, however, he was *bound* to transfer a portion of that stock to another corporation for a *cash* consideration and the new company was also *bound* to make an additional issue of its stock direct to the other corporation. Upon consummation of the entire plan Bassick did not have statutory control of the stock of the new company, nor of any other company into which its assets had been transferred.

This decision has no application to the instant case since Atlas, upon giving up the outstanding stock of the old com-

[11] In fact, so far as the assets of Black Diamond are concerned, the Atlas interest became more direct, in that the assets themselves were transferred to the new company, whereas before this transfer the Atlas interest was merely as owner of all of the Peerless stock, which company in turn owned all the stock of Black Diamond.

panies immediately received and retained ownership of a majority of the stock of each class of the new company to which the assets of the old companies were transferred.

Under the procedure adopted in the instant case, it is not significant that Atlas did not retain ownership of the stock of Peerless and Union since Atlas had the option to transfer the assets rather than the stock of the old companies to the new company. Furthermore that stock did not remain in the ownership of any party. Upon its receipt by the new company it was delivered to the old companies for cancellation.

In *Starr* v. *Commissioner*, *supra*, the taxpayer, in redemption of a part of his common stock in the old company, following a transfer of the latter's assets to a newly organized company, received cash and a dividend of special stock of the old company, which taxpayer exchanged for common stock of the new company, said cash and common stock of the new company being a part of the consideration the old company received for the transfer of its assets. The taxpayer exercised his option under the plan to deliver the balance of his common stock in the old company to the new company for shares of its preference stock at an agreed rate of exchange. He contended that the three transactions were separate and distinct, in two of which stock was exchanged for stock and no profit was realized, and that only in respect to the transfer of stock for cash was a taxable profit realized.

The Court held that the gain must be determined on the basis of the total considerations, all of which the taxpayer received for his common stock of the old company, as a part of the plan. This decision is in no way inconsistent with our position here, as we do not rely upon any single step or transaction under the plan without regard to the results accomplished by the plan as a whole.

To say that the acquisition by Atlas of the stock of the old companies did not constitute a reorganization because that stock was thereafter exchanged for stock of the new company which took the place of the old companies, is to

exalt form above substance to a degree inconsistent with the purpose of the statute. *Gregory* v. *Helvering*, 293 U. S. 465.

3. Nor is the basic distinction in the facts of the instant case, as compared with those in the *Groman case*, one merely in the form or mechanics by which the transaction was consummated (as contended by Petitioner), however important the difference in the form may be. The real significance of the difference in facts is that here the plan contemplated a consolidation of three existing businesses with Atlas through direct exchanges between Atlas and the stockholders of those companies. That consolidation was effected *through exchanges of stock*, the resulting transfer of assets being purely a corollary or subsidiary transaction effected by Atlas without the participation of the stockholders of Peerless and Union. Even more significant is the result accomplished, wherein Atlas acquired not merely a majority of the common stock of the new company (as in the *Groman case*) but *all of its stock of both classes*, thus bringing it squarely within the provisions of Sections 112(i)(2) and 112(b)(3) of the statute. That this distinction is one of substance and not merely form is clearly demonstrated by assuming a slight change in the form of the plan used in each case.

For example, had the stockholders of Peerless and Union formed the new company into which the assets of those companies were transferred, there would be no question but what the subsequent delivery by those stockholders of all of the preferred stock and 57 per cent of the common stock of the new company to Atlas in exchange for cash and Atlas common and preferred stock would have constituted a reorganization under Section 112(i)(1)(A) and Atlas would clearly be a party thereto. *Helvering* v. *Watts*, 296 U. S. 387.

Applying the same change to the plan adopted in the *Groman case* would not affect the decision reached in that case by this Court. Had the shareholders of Indiana or-

ganized Ohio, transferred to it the assets of Indiana, and thereafter delivered to Glidden the common stock of the new company in exchange for cash and Glidden prior preference stock, that exchange would not have constituted a reorganization under Section 112 (i)(1)(A) and, therefore, Glidden could not have been a "party" within the meaning of the statute. Nor would the relation of Glidden to the reorganization thus effected by the stockholders of Indiana with the new company be materially different from Glidden's relation to the reorganization as actually effected.

Thus, the distinction in facts between the cases, in their relation to the reorganization statutes, is one of substance.

To summarize the foregoing, it is the inescapable conclusion to be drawn from an analysis of the separate transactions into which the negotiations in the instant case culminated, that in them there was a direct exchange between the stockholders of the old companies and Atlas in which the former delivered to Atlas substantially all of the stock of the old companies and received therefor Atlas stock and other considerations. Atlas was under no obligations with respect to the stock received, excepting only its commitment to cause the *assets* of those companies to be transferred to the new company and it was immaterial to the stockholders of the old company what disposition Atlas made of their stock.

The result of the exchanges between Atlas and the stockholders of the old companies was to effect a reorganization in the nature of a merger or consolidation of Peerless and of Union with Atlas. *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462. *Helvering* v. *Watts, supra.* The Petitioner does not deny that these exchanges would constitute a reorganization but for the fact that Atlas converted the form of its interest to stock of the new company, which, as we have shown, did not deprive Atlas of its direct proprietary interest in the business and assets of the old companies. It is clear that Atlas was not deprived of that interest. In fact, it was because of this clear distinction in

the facts that Respondent in his Brief in Opposition to the issuance of a Writ of Certiorari contended that the Opinion of the Seventh Circuit Court of Appeals in the *Groman case* was not in conflict with the controlling part of the decision in the instant case. We believe for the same reason that it is not in conflict with that part of the Opinion of this Court in the *Groman case.*

4. Petitioner admits also that there was a statutory reorganization effected between Atlas and the new company, and that Atlas was a party to that reorganization within the meaning of Section 112(i)(2) (Petitioner's brief, p. 10). Based alone on this admission, we submit that even without consideration of the other steps in the plan, Atlas thus qualified as "a party to the reorganization" within the meaning of Section 112(b)(3) since that transaction was an indispensable and component part of a single plan of reorganization wherein Peerless and Union were consolidated with Atlas. As stated in our original Brief (p. 15), the Commissioner may not break up the plan as a whole into unrelated steps or parts to assert a tax.

Section 112(b)(3) provides—

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in *another corporation a party to the reorganization.*" (Emphasis added.)

Within the natural meaning of the words in this section they are applicable to any transaction constituting a reorganization effected in the consummation of the plan as a whole. Thus, in the instant case, the Court may conclude that there were a number of reorganizations. The Petitioner admits that there were at least two reorganizations here, one in the transfer of assets of the old companies to the new and one in the acquisition by Atlas of the majority of the stock of both classes of the new company.

This section does not confine the expression "*another corporation* a party to the reorganization" to any one particular corporation in a single reorganization. Petitioner admits that the new company is "another corporation" in the reorganization between Atlas and the new company (his Supplemental Brief, p. 10), but, without citing any authority to support his position, contends that this section is not applicable to that reorganization under the facts in the instant case. We submit that Petitioner is not justified in asking this Court to read into the plain language of the statute an interpretation not clearly shown to have been intended by Congress. Congress in enacting Section 112(i)(2) into the statute intended to remove any doubt that may have existed as to certain corporations that qualify as a party to a reorganization. See Petitioner's original Brief (p. 15), citing H. R. Rep. No. 179, 68th Congress, 1st Session, wherein it refers to the intention of Congress in enacting the section of the 1924 Act corresponding to Section 112 (i)(2) of the 1928 Act. At page 13 of the same Report (which corresponds to a similar part of the Senate Report) Congress disclosed its liberal policy of non-recognition of gain in ordinary business transactions, wherein it said:

> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation."

Atlas was "a party to the reorganization" within the natural meaning of the terms irrespective of the application of section 112 (i) (2) of the Revenue Act of 1928.

Even assuming that Atlas was not a party under Section 112 (i)(2) to a reorganization as defined in Section 112 (i)(1)(A) it would none the less qualify as a party to the admitted reorganization which was effected between the old companies and the new company.

This Court in the *Groman case* held that Section 112 (i)(2)

> "* * * is not a definition but rather is intended to enlarge the connotation of the term 'a party to a reorganization' to embrace corporations whose relation to the transaction would not in common usage be so denominated or as to whose status doubt might otherwise arise."

In reaching the conclusion that Glidden was not, in the natural meaning of the term, a party to the reorganization, the Court said that: "Glidden received nothing from the shareholders of Indiana. Glidden transferred nothing to them. The exchange was between Indiana's shareholders and Ohio." Under the circumstances of that case, the Court concluded that "Glidden was, in the transaction in question, no more than the efficient agent in bringing about a reorganization."

In the instant case, Petitioner admits that there was a reorganization effected between the old companies and the new. We submit that Atlas was "a party" within the ordinary meaning of that term to *that* reorganization. Atlas was more than an efficient agent in bringing it about. It was a direct party in fact to the exchanges with the old stockholders and with the new company, which effectuated that consolidation. Atlas actually acquired the stock of Peerless and Union, *which was the sole asset transferred by the stockholders of those companies.* The new company

acquired the stock of Peerless and Union from Atlas. Atlas, unlike Glidden, transferred to the stockholders of the old companies the sole consideration they received in the exchange, to wit: Atlas stock, cash and stock of the new company. Thus the agreement constituting the plan and the exchanges which consummated it were solely between Atlas and the shareholders of Peerless and Unión. Thus Atlas in the instant case performed the combined functions exercised by Glidden and Ohio in the *Groman case*.

On the facts in this case there was sufficient continuity of interest qua the Atlas stock within the meaning of the statute.

1. Petitioner's objection that the Atlas stock in Respondent's hands does not represent a definite, material and substantial interest in the assets transferred by the taxpayer was raised in this Court for the first time.

In the Board of Tax Appeals it was Petitioner's contention that the transaction here involved was a sale and not a reorganization, and that even if there was a reorganization Atlas was not a party thereto because it did not acquire a majority of all classes of stock of the new company. Defeated on these questions of essential fact, Petitioner in the Circuit Court of Appeals abandoned assignments of error in the findings of the Board, admitted that there had been a reorganization between the old companies and the new, but maintained that Atlas was not a party thereto because it had deliberately employed a circuitous scheme to bring about the reorganization. In this contention, Petitioner relied principally, if not entirely, on *Bus and Transport Securities Corp.* v. *Helvering,* 296 U. S. 391.

It was not until Petitioner sought from this Court the issuance of a Writ of Certiorari that he raised the question of continuity of interest. It is, therefore, submitted that it is not open to Petitioner to urge this point before this Court, any more than it was open to the petitioner in *Helvering* v.

Minnesota Tea. Co., 296 U. S. 378, to raise for the first time before this Court the question whether or not, in the transaction there involved, substantially all of the assets of the taxpayer had been transferred (see Opinion of this Court in that case at page 380).

2. Assuming, however, that Petitioner may raise this question here, it is proper to inquire how the doctrine of continuity of interest has been developed in previous cases, and how, if at all, it is applicable in the circumstances of the instant case.

The doctrine of continuity of interest was first invoked in *Cortland Specialty Co.* v. *Commissioner*, 60 Fed. 2nd, 937 (C. C. A. 2nd), certiorari denied, 288 U. S. 599, as an implied essential of a "merger" or "consolidation". The Court's summarized statement on the subject in that case is:

> "In defining 'reorganization', Section 203 (now 112) of the Revenue Act gives the widest room for all kinds of changes in corporate structure, but does not abandon the primary requisite that there must be some continuity of interest on the part of the transferor corporation or its stockholders in order to secure exemption. Reorganization presupposes continuance of business under modified corporate forms." (Parenthetical expression added)

In its opinion in *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, *supra*, this Court approved the foregoing language and followed the same reasoning in deciding that the term "securities", as used in the reorganization sections of the Revenue Act there under discussion, was not intended to include short term notes.

Following the *Pinellas case* comes that group of cases decided by this Court, which includes *Nelson Co.* v. *Helvering*, 296 U. S. 374, *Helvering* v. *Minnesota Tea Co.*, *supra*, and *Helvering* v. *Watts*, *supra*. There is nothing in the language of these cases which increases the limitations in the requirement of continuity of interest, unless it is in the

following language from the opinion in the *Minnesota Tea case:*

> "And now we add that this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation."

Thus, the doctrine has been invoked in one case (the *Pinellas case*) to assist in defining what was meant by the word "securities", a term not given a specific definition in the statute itself. In the other cases, it has been used as a test to determine whether or not the transaction partook of the nature of merger or consolidation, *i.e.*, whether or not there had been a reorganization.

Thus far there is nothing in the judicial declarations which, reasonably applied, can exclude the Respondent in the instant case, because here we are not concerned with the definition of the term "reorganization", nor with the question of what constitutes "a substantial part of the value of the thing transferred". Therefore, the doctrine of continuity of interest, as expounded in the decisions of this Court preceding the *Groman case* have no bearing here.

Does the decision of this Court in the *Groman case* require us to alter this conclusion? In that case this Court was called upon to decide whether or not Glidden was a party to the reorganization between Ohio and Indiana. The taxpayer had to admit that Glidden did not come within the literal terms of Section 112 (i) (2) because it had not acquired at least a majority of all classes of stock of any other corporation in the reorganization. Petitioner in that case therefore urged that the description of "a party to a reorganization" in Section 112 (i) (2) was not an exclusive definition of that phrase, and that Glidden, by reason of its intimate connection with the reorganization, was in fact a party thereto.

This Court determined that that section was not an exclusive definition of the phrase "a party to a reorganization". It, therefore, went on to determine whether or not Glidden, which had *not* complied with the literal terms of Section 112 (i) (2), could nevertheless be held a party to the particular reorganization in question.

The facts of the case were analyzed and it was found that in the transaction Glidden had received nothing from the Indiana shareholders and had transferred nothing to them. In fact, it had been no more than the efficient agent in bringing about the reorganization. Hence, this Court said:

> "It was not, in the natural meaning of the term, a party to the reorganization."

But the taxpayer had argued that Ohio had been no more than the *alter ego* of Glidden in the transaction. To dispose of this argument and to remove any further doubt that there might be that Glidden, not a party within the literal terms of the statute, should nevertheless qualify as such on the facts of the case, this Court analyzed the situation from the viewpoint of continuity of interest, and found that Glidden's stock in the hands of Indiana's former shareholders did not, because of Glidden's ownership of the common stock of Ohio, represent a continued substantial interest in the assets transferred to Ohio. In other words, in fortifying its conclusion that Glidden was not a party to the reorganization within the ordinary meaning of the words employed in the statute, the Court found, under its application of the doctrine of continuity of interest, that Glidden was not "a party" within the spirit of the statute.

Here the facts are materially different. If, as hereinabove urged on behalf of the Respondent, there was an exchange between Atlas and the stockholders of the old companies within the meaning of Section 112 (i) (1) (A) and Section 112 (i) (2), in which substantially all of the stock of Peerless and Union was exchanged for Atlas stock, there can be no question but what there was continuity of inter-

est qua the Atlas stock. If, on the other hand, Atlas' acquisition of the stock of the new company is alone to be considered, it acquired not only a majority of the *common* stock of the new company, but *all of its preferred stock.* This compliance with the literal terms of the statute *imports* a continuity of interest, and there is no need or warrant to analyze the transactions further if such literal compliance is found to exist. To do so would, in effect, be to change or amend the statute by judicial interpretation.

In the parenthetical clause of Section 112 (i) (1) (A) and in Section 112 (i) (2) Congress has indicated that it attaches importance to the degree or amount of stock interest acquired in the determination of whether or not there is a reorganization and whether the acquiring corporation was a party thereto. Here Atlas has not only acquired a substantially greater proportion of stock in the new company than Glidden did in the *Groman case*, but it has acquired such stock *to the degree specifically set forth in those sections.*

Furthermore, if, because of Atlas' direct participation in *all* of the transactions and exchanges here involved, it is a "party" to the admitted reorganization between the old companies and the new, within the ordinary and usual meaning of that word as used in Section 112 (b) (3)[12] then it should not be necessary to consider the doctrine of continuity of interest in this connection.

There is no claim here that the new company was the *alter ego* of Atlas. As pointed out above, the purpose of the new company here was not to act for Atlas in the reorganization. The new company did nothing. It did not acquire the stocks of the old companies direct from their stockholders. It transferred nothing to them. It simply served, by agreement of all parties to the transaction, as the corporate entity into the possession and ownership of

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[12] See argument in the second main point of this Brief beginning at page 17.

which all of the *assets* of the old companies were transferred.

Does the language of the Opinion in the *Groman case* preclude the finding here that Atlas was a party to the reorganization? In answering the petitioner's argument in that case that Ohio was to be considered the *alter ego* of Glidden, this Court said:

> "But to do so would be to ignore the purpose of the reorganization sections of the statute, which, as we have said, is that where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss. If cash or 'other property',—that is, property other than stock or securities of the reorganized corporations,—is received, present gain or loss must be recognized."

It is respectfully submitted that this language must be read as applying *strictly to the particular facts of the case under consideration, i.e.*, that there had been no literal compliance with the provisions of Section 112 (i) (2), and that the corporation sought to be considered a party to the reorganization had been found on the facts to be no more than the efficient agent in bringing about the only reorganization effected in that case.

If this language is to be considered as broadly laying down a rule for future guidance in determining *in all cases*, irrespective of whether or not there has been compliance with Section 112 (i) (2), who is a party to a reorganization, then the last sentence of that part of the Opinion of this Court quoted above, appears to be wholly inconsistent with the language of the statute and all prior applications and interpretations of it, unless, of course, the words "reorganized corporations" are to be taken to mean all corporations *which are parties to the reorganiza-*

tion. The distinction as to what "other property" is, must necessarily be drawn from the requirements as to "stock or securities" set forth in Sections 112 (b) (3) and (4). In these sections the requirement is, *not* that the "stock or securities" on which "no gain or loss shall be recognized" must be "of the reorganized corporations", *but* that they must be of "a corporation a party to the reorganization". Clearly a party to the reorganization may be a corporation other than the corporation which is reorganized. For example, a new corporation to which the assets of the old corporation are transferred is specifically made a "party to a reorganization" under Section 112 (i) (2), but certainly the new corporation is not a *re*organized corporation. In fact, in neither the *Groman case* nor the instant case was it questioned that the new company was a party to the reorganization.

Furthermore, if this language is to be taken as laying down a rule of broad application, then the word "party" as used in Sections 112 (b) (3) and 112 (i) (2), is necessarily limited to the *transferee* and the *transferor* corporations. If Congress had meant so to limit the meaning of "another corporation" to the transferor and transferee corporations, it could easily have said so in language much more simple and direct than the present language of Sections 112 (b) (3) and 112 (i) (1) and (2). It is earnestly submitted, therefore, that the above quoted language from the Opinion of this Court in the *Groman case* must be read strictly as an answer to the *alter ego* argument advanced by the petitioner in that case, and as strictly applicable only to the particular facts of that case. Any broader construction of this language would effect, by judicial decision, a substantial alteration and amendment of the statute.

Assuming, however, that this language from the Opinion in the *Groman case* is broadly applicable as interpreting the reorganization sections of the Revenue Act of 1928, even then Atlas qualified as a *direct party* to the only trans-

action in the instant case which, treating substance rather than form, involved the real reorganization intended and negotiated by the parties. It transferred Atlas stock and other considerations to the taxpayer in a direct exchange with him for his Peerless stock. This undoubtedly constituted a reorganization as that term is defined in Section 112 (i) (1) (A). See *Helvering* v. *Watts, supra.* If in that case, this Court found that the Vanadium stock in the hands of Watts represented a definite and substantial continuing interest on his part in the asset which he had transferred, viz., his Ferro-Alloys stock, then here the Atlas stock in Respondent's hands represented a definite and substantial continuing interest in the Peerless stock with which he had parted to Atlas. What Atlas did, on acquiring this stock, was merely to effect a rearrangement of the *form* of that asset in its hands, and, so far as Respondent was concerned, it mattered not at all, from the point of view of the substance of the transaction, that, through a transformation consistent with the purpose of the plan this Peerless stock passed out of existence and was replaced by stock of the new company.

Consequently, Atlas should be regarded as a party to the reorganization, and the gain upon the acquisition of its stock is, therefore, not subject to recognition under Section 112(b)(3) of the Revenue Act of 1928.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Raymond I. Bashford. | On Certiorari to the United States Court of Appeals for the Third Circuit.

[January 3, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

Whether Bashford is liable for a deficiency in the income taxes assessed for the year 1930 depends upon whether Atlas Powder Company was, as defined by § 112 (i) (2) of the Revenue Act of 1928, "'a party to the reorganization'" of the Peerless Explosives Company.

Atlas Powder Company desired to eliminate the competition of three concerns—Peerless Explosives Company, Union Explosives Company and Black Diamond Powder Company. Deeming it unwise to do so by buying either their stock or their assets, Atlas conceived and consummated a plan for consolidating the three competitors into a new corporation, with Atlas to get a majority of its stock. To this end holders of the stock of the three companies were duly approached by individuals who represented Atlas; their agreements to carry out the plan were obtained; the new corporation was formed and became the owner practically of all the stock, and all the assets, of the three competitors; Atlas became the owner of all the preferred stock and 57% of the common stock of the new corporation; and in exchange for the stock in the three companies each of the former stockholders received some common stock in the new company, some Atlas stock, and some cash which Atlas supplied.

Bashford, one of the stockholders in Peerless, received in exchange for his stock 2,720.08 shares of the common stock of the new corporation, $25,306.67 in cash, 625 shares of Atlas preferred, and 1344 shares of Atlas common. In his income tax return for the year 1930 he included all the cash, but did not include the gain on stock of either the new corporation or Atlas. The Commis-

sioner concedes that gain on the stock in the new corporation was properly omitted, since the new company was a "reorganization" of Peerless. He insists that the Atlas stock should have been included, as it was "other property" on which gain was taxable under §112 (c) (1) of the Revenue Act of 1928, since Atlas was not "a party to the reorganization". The Board of Tax Appeals (33 B. T. A. 10) held that Atlas was "a party to the reorganization", and hence that gain on its stock was properly omitted by Bashford. The Circuit Court of Appeals for the Third Circuit affirmed that judgment. 87 F. (2d) 827. Because of alleged conflict of the decision with *Commissioner* v. *Groman,* 86 F. (2d) 670, we granted certiorari in both cases.

In *Groman* v. *Commissioner,* decided by us November 8, 1937, we gave the following construction to the reorganization sections here involved:

"Where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss."

Applying the rule, we held there that the Glidden stock received by Groman was "other property" and he, therefore, liable on the deficiency assessment; because the Glidden Company was not "a party to the reorganization", although it had, pursuant to agreement with the stockholders of the Indiana corporation, caused it to be reorganized as an Ohio corporation; had taken for itself all the common stock of Ohio; and had distributed among the former stockholders of Indiana the Ohio preferred stock and some Glidden stock, as well as cash, which it supplied. Applying the rule here, we hold likewise that the Atlas stock was "other property" and Bashford, therefore, liable on the deficiency assessment; because the Atlas Powder Company was not "a party to the reorganization".

Bashford contends that there is a clear distinction in the facts between the case at bar and the *Groman* case which should lead to a different conclusion here. The differences mainly relied upon are these:

1. In the Groman case, the court found that Glidden did not acquire a majority of the shares of the voting stock and a majority

of the shares of all other classes of stock involved, whereas here the facts were as follows: Atlas acquired "not only a majority of the voting stock and a majority of the stock of all other classes of another corporation (the new company) in the reorganization, but of all the other corporations (Peerless and Union) in the reorganization."

2. "Atlas acquired as part of the plan, substantially all of the shares of Peerless and Union in direct exchanges with the taxpayers and the other stockholders of those companies in part consideration for which it delivered to the shareholders 6,318 shares of Atlas preferred stock and 8712½ shares of common."

3. "Atlas, unlike Glidden was a party to all the exchanges, while the new company was a party only to exchanges with Atlas."

4. "The stockholders of Peerless and Union did not participate in the contract or exchange between Atlas and the new company."

Any direct ownership by Atlas of Peerless, Black Diamond, and Union was transitory and without real substance; it was part of a plan which contemplated the immediate transfer of the stock or the assets or both of the three reorganized companies to the new Atlas subsidiary. Hence, under the rule stated, the above distinctions are not of legal significance. The difference in the degree of stock control by the parent company of its subsidiary and the difference in the method or means by which that control was secured are not material. The participation of Atlas in the reorganization of its competitors into a new company which became a subsidiary did not make Atlas "a party to the reorganization". The continuity of interest required by the rule is lacking.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of the case.

Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER are of opinion that the Board of Tax Appeals and the Circuit Court of Appeals reached the right conclusion, and that the judgment below should be affirmed.